92-1007

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LAWRENCE GREGORY CARLTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 14, 1992

3617

## QUESTION PRESENTED

Was it plain error to allow the government impermissibly to shift the burden of proof to the defendant in a drug conspiracy case to show that the defendant was acting as a confidential informant, where the error occurred in the final moments of the prosecutor's jury argument and out of the earshot of Petitioner, where the appellate court acknowledged the error and where the government's case otherwise was weak and the trial was flawed by other errors?

## LISTING OF PARTIES

The parties to the proceedings before the Court of Appeals for the Fifth Circuit were Lawrence Gregory Carlton and the United States of America. Petitioner's counsel of record in the Court of Appeals was Steven A. Shaw, formerly a partner with the Houston, Texas law firm of Weil, Gotshal & Manges and currently a member of the Washington, D.C. law firm of Howrey & Simon. Respondent was represented in the Court of Appeals by Paula C. Offenhauser, Assistant United States Attorney. There are no parent companies, subsidiaries or affiliates involved in this case.

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UNITED STATES OF AMERICA,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Lawrence Gregory Carlton ("Petitioner") respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered on September 15, 1992, which affirmed a judgment of the United States District Court for the Southern District of Texas convicting Mr. Carlton of conspiracy to possess with intent to distribute cocaine, and sentencing him to 365 months imprisonment.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *U. S. v. Carlton*, (unpublished) (reproduced as Appendix A). The judgment of the United States District Court for the Southern District of Texas was rendered without opinion.

## JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on September 15, 1992. This Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

This case involves Federal Rule of Criminal Procedure 52(b), 18 U.S.C. (reproduced as Appendix B).

## STATEMENT OF THE CASE

This case arose when Customs Agent Greg Gessner ("Agent Gessner") plitted two documented confidential informants, U Daya Chand "Danny" Thakur ("Informant Thakur") and Lawrence Gregory Carlton against each other without informing either that the other worked for the government. Both informants acted out the pretended roles of drug dealers in a transaction where the inexperienced informant, Mr. Carlton, acted as a drug broker and the experienced informant, Mr. Thakur, acted as a drug buyer. The government sought to distinguish Mr. Carlton's activity from that of Informant Thakur by imputing to Mr. Carlton an unlawful intent.

Facts other than those relating to Mr. Carlton's intent are largely undisputed. In the Spring of 1990, Mr. Carlton met Informant Thakur. At this first meeting, Mr. Carlton told Informant Thakur that he could supply him with drugs and Informant Thakur in turn told Mr. Carlton he could sell what

Mr. Carlton provided. On May 9, 1990, Mr. Carlton reported this meeting to Agent Gessner.

On August 7, 1990, Mr. Carlton told Informant Thakur that he had 30 "cars" available. Informant Thakur told Mr. Carlton that the deal could be finalized on August 8, 1990, but wanted to inspect the merchandise first. On August 7, Informant Thakur visited Mr. Carlton at home, inspected the drugs there and advised Mr. Carlton that he would return later with the money. He immediately reported to DEA Special Agent James D. Phenicie ("Agent Phenicie") regarding this transaction. Following Informant Thakur's departure, government agents entered Mr. Carlton's home without a warrant or Mr. Carlton's consent, seized the drugs and arrested Mr. Carlton.

On April 11, 1990, Petitioner Lawrence Gregory Carlton was found guilty of conspiracy to possess with intent to distribute in excess of 5 kilograms of the Schedule II Controlled Substance Cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. This conviction followed a seven-day jury trial at which the government produced three witnesses -- Informant Thakur and Agents Gessner and Phenicie. Originally, Mr. Carlton was indicted along with an alleged co-conspirator, Kenneth Charles Fragosa on three counts. As to this indictment, the government moved for dismissal without prejudice but this motion was denied. Subsequently, the court dismissed Counts 2 and 3 of the indictment after the government again moved for dismissal due to insufficiency of evidence.

On March 26, 1991, the district court granted a motion for severance permitting Messrs. Carlton and Fragosa to be tried separately. The district court entered judgment on June 25, 1991 against Mr. Carlton and ordered his imprisonment for 365 months. Mr. Carlton filed a *pro se* Notice of Appeal on June 20, 1991 following his sentencing hearing. After appointment of counsel by the United States Magistrate, Mr. Carlton filed an Amended Notice of Appeal on June 28, 1991.

Prior to trial, the district court conducted a suppression hearing, during which evidence of the warrantless search and

arrest of Mr. Carlton was presented. Following the hearing, the district court ordered that all evidence obtained from the warrantless entry and search of Mr. Carlton's home, and all fruits thereof, be suppressed as evidence at trial.

Mr. Carlton argued on appeal that the fairness of his trial was jeopardized in at least several respects. First, Mr. Carlton contended that his ability to impeach one of the key government witnesses, Agent Gessner, on the exact instructions given to confidential informants was improperly constrained when the district court quashed a subpoena duces tecum of the United States Customs Policy Manual ("Customs Manual") containing guidelines upon which the instructions may have been based. Mr. Carlton also contended that admission of evidence of the cash in Mr. Carlton's safety deposit box -- which evidence was obtained through the warrantless search and arrest of Mr. Carlton -- was improper.[1]

Finally, Mr. Carlton maintained that the prosecutor jeopardized the fairness of the trial during jury argument when he misstated the law and the district court's charge by shifting the burden of proof to Mr. Carlton to show that he acted as a confidential informant. The prosecutor improperly stated:

> If you say to yourself and you believe beyond a reasonable doubt, after everything you've heard, that [Mr. Carlton] was, in fact, acting like a confidential informant or he was a confidential informant acting in that capacity on that day, then he didn't have the intent and that is what the charge says and then he gets to go. And that is the law.

*United States v. Carlton*, Appendix A at 6a (emphasis deleted). The prosecutor whispered this misstatement to the jury out of

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[1] Mr. Carlton also objected to, as irrelevant, Agent Gessner's testimony that Mr. Carlton was acting independently of Agent Gessner. After the court overruled his objection and allowed the testimony, Mr. Carlton moved for a mistrial. That motion was denied, and Mr. Carlton does not raise that point before the Court.

earshot of Petitioner and thus deprived Petitioner the opportunity to object.

The Court of Appeals affirmed the conviction and sentence of the district court. The appellate court first held that the district court's decision to deny Mr. Carlton's request for the Customs Manual was not error because admission of the Customs Manual would not have altered the outcome of the trial. Moreover, the Fifth Circuit held that the district court did not err in admitting evidence of Mr. Carlton's safe deposit box.

The appellate court then agreed with Mr. Carlton that the prosecutor blatantly had misstated the law in shifting the burden of proof from the government. The Court stated:

> We do not condone the government's blatant misstatement of the law in this case. Nor are we foreclosing the possibility that under other facts, a similar argument could constitute plain error. [Citations omitted]. We only hold, that based on the totality of the circumstances, this misstatement did not rise to the level of plain error.

*United States v. Carlton*, Appendix A at 8a. Since the court incorrectly assessed the prejudicial impact on Mr. Carlton from this error by itself and, especially, in combination with the other errors of the trial, the court erroneously held that the error did not rise to the level of plain error requiring reversal.

## REASONS FOR GRANTING THE WRIT

The Court should review this case because it provides the unique opportunity to reach an important question of federal law and to resolve confusion among the circuits regarding the effect of blatant prosecutorial misconduct in a case that has been marred by other errors. During the final moments of its closing argument at trial and out of earshot of Petitioner, the prosecution impermissibly shifted the burden of proof on intent from the government to Petitioner, in a case in which the sole defense was

lawful intent. The appellate court explicitly agreed that the prosecutor flagrantly misstated the law in this case. This impermissible burden-shifting constituted plain error. *Mann v. United States*, 319 F.2d 404, 410 (5th Cir. 1963), *cert. denied*, 375 U.S. 986 (1964).

Moreover, the court denied Petitioner the opportunity to impeach one of the government's key witnesses on the crucial issue of Petitioner's intent by excluding evidence of the Customs Manual. That Manual contained instructions for customs agents in handling confidential informants like Petitioner, and may have turned the collective mind of this particular jury that twice asked for clarification on the Agent's instructions to confidential informants. The court's exclusion of the Customs Manual, combined with the prosecutorial misstatement of the burden of proof, gravely damaged Petitioner's defense regarding intent, and was reversible error.

Furthermore, despite Petitioner's repeated objections, the court admitted illegal evidence regarding the contents of Petitioner's safety deposit box, obtained through the warrantless arrest of Petitioner and illegal search of his home. The government sought this evidence to prove that Petitioner had an unlawful intention to deal in illegal drugs while he served as a confidential informant. The court's admission of this illegal evidence dealt another devastating blow to Petitioner's intent defense, and was reversible error.

The Fifth Circuit's affirmance of the district court decision has grave consequences for Petitioner and others like him who are victims of unredressed prosecutorial misconduct which occurs in the context of an otherwise flawed trial. The effects of the uncorrected error especially are obvious where, as in this case, the fundamental error is one of constitutional dimensions that goes to the heart of the case. By reviewing this case, the Court has the opportunity to establish guidelines to prevent a pattern of escalating errors which fatally prejudices the verdict and ultimately distorts the public perception of judicial impartiality.

## CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE GOVERNMENT'S MISSTATEMENT OF THE BURDEN OF PROOF IN ITS JURY ARGUMENT IS PLAIN ERROR IN A CASE IN WHICH OTHER ERRORS HAD BEEN COMMITTED

### 1. Prosecutorial Burden-Shifting

This Court definitively has established that proof of a criminal charge beyond a reasonable doubt is required by the United States Constitution, and that the government bears the burden of proof on that issue. *In re Winship*, 397 U. S. 358, 362 (1970). The erroneous allocation of the burden of proof to the criminal defendant is an error of constitutional dimension. *United States v. Scott*, 529 F.2d 338, 340 (D.C. Cir. 1975). This Court has set forth the standard for determining whether an error is harmless: "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U. S. 18, 24 (1967).

Prosecutorial misstatements and impermissible burden-shifting in jury arguments have been held to be reversible error under either a harmless error standard, *U. S. v. Scott*, 529 F.2d at 340-41; *United States v. Smith*, 500 F.2d 293, 297 (6th Cir. 1974); or a plain error standard. *United States v. Segna*, 555 F.2d 226, 231 (9th Cir. 1977); *Mann v. United States*, 319 F.2d at 404. *See also United States v. Cantu*, 876 F.2d 1134, 1138 (5th Cir. 1989) (prosecutor's misstatement of the burden of proof is reversible error); *People v. Antommarchi*, No. 180, 1992 N.Y. LEXIS 3475 (N.Y. Oct. 27, 1992) (jury charge which reversed burden of proof violated due process clauses of state and federal constitutions and constituted reversible error). Courts apply the plain error rule to notice "[p]lain errors . . . affecting substantial rights . . . although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b), 18 U.S.C. Under the plain error rule, courts may reverse if the misconduct "either (1) had a prejudicial impact on the verdict when viewed in the context of

the trial as a whole, or (2) 'seriously affect[ed] the . . . integrity or public reputation of [the] judicial proceedings.'" *United States v. Young*, 470 U.S. 1, 21 (1985) (Brennan, J., dissenting) (citations omitted).

In *Mann*, the district court improperly instructed the jury in an income tax evasion case and effectively shifted the burden of proof to the defendant on the central issue of intent. *Id.* at 409. The Fifth Circuit held this impermissible burden-shifting regarding a vital aspect of the case so fundamental an error as to require reversal. *Id.* at 410. The court further held that although the erroneous burden-shifting was isolated and was corrected by other instructions, the proper instructions did not cure the error. *Id.* Since the *Mann* court focused on the erroneous burden-shifting itself, the rationale of the case applies with equal force where, as here, the improper burden-shifting results from a prosecutorial misstatement rather than a court error.

The Court of Appeals applied the plain error rule in addressing the issue of the prosecutor's misstatement of the burden of proof because Petitioner did not object contemporaneously to the prosecutor's misstatement of the law. Courts have held that error cannot be considered nonprejudicial simply because of defense counsel's silence. *United States v. Alston*, 551 F.2d 315, 321 (D. C. Cir. 1976). This is especially true in cases like this where defense counsel did not originally hear the prosecutor's burden-shifting remark, and only became aware of the comment after the jury had been dismissed.

The Court of Appeals fully agreed with Petitioner that the government made a "blatant misstatement of the law in this case." *United States v. Carlton*, Appendix A at 8a n.2. The court cited two cases for the proposition that, under appropriate circumstances, such impermissible burden-shifting would be plain error. *Id.* (citing *United States v. Vargas*, 583 F.2d 380, 386-87 (7th Cir. 1978), and *United States v. Segna*, 555 F.2d 226, 230-32 (9th Cir. 1977)). The court failed to recognize the similarities between this case and the two cited cases. These similarities include the fact that all three cases involved a

prosecutorial misstatement of the law related to the central issue in the case. The Court should have followed the cited cases and held that the erroneous burden-shifting constituted plain error in this case.

The Fifth Circuit decision is at odds with decisions in other circuits and with its own previous decision in *Mann* regarding the prejudicial effect of burden-shifting on a criminal defendant. For example, the Seventh Circuit found reversible error in a drug trafficking case where the prosecutor distorted the burden of proof regarding the primary issue of the defendant's credibility. *United States v. Vargas*, 583 F.2d at 387. The court held that although the prosecutor's comments on the defendant's veracity alone constituted plain error, the error was compounded by prosecutor's other improper comments regarding the defendant's previous drug-dealing activities. *Id.* at 387-88. Taken together, the prejudice from these comments required reversal. *Id.* at 388.

The Ninth Circuit also found reversible error in an homicide case where the prosecutor shifted the burden of proof on the sole contested issue of the defendant's sanity. *United States v. Segna*, 555 F.2d at 231. The court noted that since the question of the defendant's sanity was a critical and close one, the prosecutor's improper comment that the defendant had to prove his sanity was plain error requiring reversal. *Id.* at 231-32. The court particularly was impressed by the fact that, although the burden correctly was stated by the court and by the prosecutor himself at other points during his argument, the prosecutorial burden-shifting occurred, as here, in the final moments of the prosecutor's argument, increasing the likelihood of prejudice. *Id.* at 232.

As noted earlier, the Fifth Circuit itself earlier found fundamental reversible error where the jury instructions shifted the burden of proof on the critical issue of intent. *Mann v. United States*, 319 F.2d at 410. In this case, the Fifth Circuit ignored precedent from other circuits and its own prior case law involving very similar factual circumstances, and refused to find reversible error where the prosecutor misstated the burden of proof relating

to Petitioner's intent, the controlling issue in this case. *United States v. Carlton*, Appendix A at 7a.

The appellate court reasoned that the prosecutor's erroneous burden-shifting was not plain error because Petitioner was not prejudiced by the misstatement in view of the facts that the court gave correct instructions and the government otherwise correctly stated the burden during the course of the trial. *Id.* Appendix A at 6a-7a. Given these exact same circumstances, the *Segna* and *Mann* courts easily found reversible error. *United States v. Segna*, 555 F.2d at 232; *Mann v. United States*, 319 F.2d at 410. The Fifth Circuit's refusal to find reversible plain error on this issue jeopardized Petitioner's right to a fair trial regarding other evidentiary errors. This is especially true where, as here, the government impliedly admitted that its case was weak, as demonstrated by its motion to dismiss filed prior to trial.

**2. Failure to Admit the Customs Manual**

The district court's suppression of the Customs Manual containing guidelines for control of confidential informants denied Petitioner a fair trial. The government's case to establish Petitioner's unlawful intent was built circumstantially upon a comparison between Informant Thakur and Petitioner. The point of this comparison was to show, inferentially, that Informant Thakur had a lawful intent because he followed the instructions of Agent Gessner while Petitioner had an unlawful intent because he did not follow the instructions.

Agent Gessner's testimony about the instructions he gave to his documented informants spans 30 pages of the trial transcript. The issue of Agent Gessner's instructions to informants became the subject of two jury notes submitted to the court after the jury began its deliberations. Deprived of the guidelines provided to Agent Gessner on handling his confidential informants, Petitioner was unable effectively to demonstrate to the jury that the instructions were rather loose and, more importantly, that his behavior fell within the instructions he received.

It was error to deny Petitioner the specific request for the Customs Manual to impeach the key government witnesses, Agent Gessner and Informant Thakur. Impeachment evidence falls within the rule of *Brady v. Maryland*, in which the Court held that the prosecution's suppression of evidence favorable to an accused violates due process where the evidence is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The *Brady* rule encompasses impeachment evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985) including evidence which provides an additional, but not exclusive, basis for impeachment. *Smith v. Black*, 904 F.2d 950, 964, *rehearing denied*, 912 F.2d 1465 (5th Cir. 1990), *cert. granted and vacated on other grounds*, ___ U.S. ___, 112 S. Ct. 1463 (1992). The admission of *Brady* evidence especially is important where the evidence is sought to impeach key witnesses. *Bagley v. Lumpkin*, 798 F.2d 1297, 1304 (9th Cir. 1986). Petitioner sought admission of the Customs Manual to impeach the government's two key witnesses and, hence, the Manual should have been made available to Petitioner.

The two jury notes suggest that if Petitioner had been able to impeach the testimony of Agent Gessner with the Customs Manual, there is at least a reasonable likelihood that the outcome of this case would have been affected. The Fifth Circuit has recognized that it is not "unreasonable to conclude that had [the government's key witness] been forcefully impeached, the jury's verdict might have been different." *United States v. Auten*, 632 F.2d 478, 482 (5th Cir. 1980). The court's suppression of material evidence in violation of the Petitioner's Fifth Amendment due process rights, especially viewed in conjunction with the other trial errors, was prejudicial error meriting a new trial.

### 3. Admission of Tainted Evidence

The court's admission of illegally-obtained evidence in violation of the Fourth Amendment and the court's own suppression order also constituted prejudicial error requiring a new trial. Immediately following his illegal arrest on April 7,

1990, Petitioner told the arresting agents that he had a safety deposit at Texas Commerce Bank ("TCB"). Based on this and a subsequent statement, the government obtained a search warrant of the TCB safety deposit box and discovered it contained $12,400. Over numerous objections, government witness, Agent Phenicie, testified about the contents of the safety deposit box.

Prior to the introduction of the evidence of the $12,400, defense counsel objected that the evidence derived from the warrantless and illegal search. The court itself prior to trial had agreed that the government's pre-arrest search of Petitioner was illegal and, appropriately, had issued a suppression order. Evidence of the $12,400 now at issue was tainted by this illegal search. Accordingly, Petitioner requested a suppression hearing on the issue of the admission of evidence of the $12,400. After the court denied Petitioner's request for a suppression hearing, Petitioner moved for a mistrial. This motion also was denied. On summation, the prosecutor clarified that the purpose for admitting evidence of the $12,400 was to raise yet another inference of Petitioner's unlawful intention to deal in illegal drugs while serving as a government informant.

If evidence of the $12,400 was tainted by the warrantless arrest and search, then it was "fruit of the poisonous tree". *Wong Sung v. United States*, 371 U.S. 471 (1963). In Agent Phenicie's affidavit, and in response to Petitioner's objection to use of this evidence, the government implied that Petitioner voluntarily advised the United States Magistrate about his safety deposit box on the day following his unlawful arrest. This mere assertion is not sufficient to overcome the presumption that the evidence was tainted. *See also Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (not harmless error where rifle which was seized without warrant or consent and admitted into evidence plainly was damaging to defendant's case). The Fifth Circuit has held that the government has the burden of proving "a sufficient break in events to undermine the inference that the consent to a search was caused by the fourth amendment violation." *United States v. Cherry*, 759 F.2d 1196, 1211 (5th Cir. 1985).

Contrary to the government's allegations in this case, this burden is not satisfied by a showing of intervening probable cause between the prior illegal act and the subsequent availability of challenged evidence. *Id.* at 1211-12. This burden also is not met by showing that *Miranda* warnings were given before the challenged evidence was obtained. *Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); *Taylor v. Alabama*, 457 U.S. 687 (1982). The government in this case has not met its burden to prove that the evidence regarding the $12,400 legally was obtained.

The court's admission of evidence of the $12,400, therefore, was a constitutional error. This error in combination with the other errors of burden-shifting and inadmissibility of the Customs Manual effectively gutted Petitioner's critical intent defense. These errors individually and collectively affected Petitioner's substantial rights to a fair trial. This especially is true where, as here, the government's case admittedly was weak and solely was based on circumstantial evidence. *See Glasser v. United States*, 315 U.S. 60, 67 (1942) (error cannot be disregarded as immaterial where government's case is weak). Yet, the appellate court did not hold the prosecution to its burden of proof under *Chapman* to show that these errors were harmless beyond a reasonable doubt.

## CONCLUSION

This petition for a writ of certiorari should be granted, and the decision of the court below should be reversed and remanded for a new trial.

Respectfully submitted,

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December 14, 1992

# APPENDICES

**APPENDIX A**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 91-2686**

**Summary Calendar**
**Decided: September 15, 1992**

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**UNITED STATES OF AMERICA,**
**Plaintiff-Appellee.**

**v.**

**LAWRENCE GREGORY CARLTON,**
**Defendant-Appellant.**

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**Appeals from the United States District Court**
**for the Southern District of Texas**
**(CA H 90 328)**

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Before KING and WIENER, Circuit Judges.*

PER CURIAM:**

After a jury trial, defendant-appellant Lawrence Gregory Carlton was convicted of conspiracy to possess with intent to distribute cocaine under 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A),

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* This matter is being decided by a quorum. See 28 U.S.C. § 46(d).

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

and 846. On appeal, Carlton complains of four alleged errors. For the following reasons, we affirm the district court's judgment of conviction and sentence.

## I. BACKGROUND

This is a case in which the government used one documented confidential informant, U Daya "Danny" Chand Thakur ("Informant Thakur") against another, the defendant Carlton. Carlton was arrested after negotiating to sell cocaine to Thakur. At trial, Carlton did not dispute that he negotiated this sale, but instead claimed that he, like Thakur, was acting as a government informant during their meetings.

Both Informant Thakur and Carlton were under the control of Special Agent Gregory Gessner ("Agent Gessner") of the U.S. Customs Service, and neither knew that the other was a government informant at the time of the transaction in question. Agent Gessner testified at trial that when Carlton first became an informant, he verbally instructed Carlton "to contact me on every contact he had, on every action he took, before and after." Agent Gessner also testified that he instructed Carlton "not to take any participating role in any interaction because of his parole status." Once Carlton became a documented source of information, Gessner "reiterated [to Carlton] the need to keep me posted on any and all contacts that he might have with any individuals" relating to narcotics investigations. Similar instructions, Gessner testified, were also given to Informant Thakur.

The central issue for the jury at Carlton's trial was whether Carlton had the requisite criminal intent — that is, whether he was acting in his capacity as a documented source of information. To demonstrate that Carlton was acting outside his role as government informant and with criminal intent, the government introduced evidence of Informant Thakur's behavior during the negotiations, and compared it with Carlton's behavior during the same time frame. While the negotiations for the drug sale were

in progress, Informant Thakur had numerous contacts with government agents. Carlton, on the other hand, did not display such diligence. Agent Gessner testified that although Carlton initially contacted him about Thakur being a potential target, Carlton did not inform him of subsequent negotiations and meetings with Informant Thakur. In short, the government portrayed Informant Thakur as the "model" documented informant — one who followed Agent Gessner's instructions — and Carlton as the "fallen" informant — one who did not follow those same instructions, but instead chose to act independently.

Ultimately, the jury found Carlton guilty of conspiracy to possess with intent to distribute cocaine. The District Court sentenced Carlton to 365 months imprisonment, followed by 10 years supervised release. Carlton subsequently filed a timely notice of appeal.

## II. ANALYSIS

Carlton raises four points on appeal. First, he argues that the District Court erred in denying his request for the U.S. Customs Policy Manual, a manual which Carlton contends could have been used to impeach Agent Gessner's testimony concerning the instructions given to informants like Carlton. Second, Carlton claims that it was plain error for the government to misstate the burden of proof during jury argument. Third, Carlton argues that the District Court erred in allowing Agent Gessner, over objection, to testify that he thought Carlton was acting independently when negotiating to sell Thakur cocaine. And finally, Carlton contends that the District Court committed reversible error in permitting the government to introduce testimony concerning money found in Carlton's safety deposit box. We shall address each of these issues in turn.

**A. Suppression of the U.S. Customs Policy Manual**

Carlton argues that the District Court erred in denying his specific request for production of the United States Customs Policy Manual. Specifically, Carlton argues that the District Court's denial of access to the manual violated the rule established in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). He claims that the manual would have allowed him to impeach the key government witnesses, Agent Gessner and Informant Thakur. We disagree.

In *Brady v. Maryland*, the Supreme Court held that the prosecution's suppression of "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196-97. To succeed on a *Brady* claim, the defendant must demonstrate: (1) that evidence was suppressed; (2) that this evidence was favorable to the accused; and (3) that the evidence was material either to guilt or punishment. *Brogdon v. Blackburn*, 790 F.2d 1164, 1167 (5th Cir. 1986) (per curiam), *cert. denied*, 481 U.S. 1042, 107 S. Ct. 1985 (1987). Favorable evidence includes exculpatory as well as impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380 (1985) (citing *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972)). Evidence is material within the meaning of *Brady* only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383. Carlton's *Brady* claim fails for two reasons.

First, a careful examination of the pertinent parts of the U.S. Customs Policy Manual, which was delivered to this court under seal, reveals that the manual was not favorable to Carlton. It did not contain passages that would have been exculpatory nor would it have served to impeach in any meaningful way the testimony of Agent Gessner or Informant Thakur. Contrary to Carlton's assertions, the manual would not have allowed Carlton

to impeach Agent Gessner "on the exact instructions given to confidential informants." The most that may be said of the manual is that it was neutral, and neutral evidence is not within the purview of *Brady*. *See United States v. Cochran*, 697 F.2d 600, 605 (5th Cir. 1983); *see also United States v. Johnson*, 872 F.2d 612, 619 (5th Cir. 1989) (concluding, in criminal case involving the use of a government informant, that FBI guidelines governing the use of informants were not exculpatory and did not contain material that could have been used for impeachment purposes).

Further, even if the manual arguably could be considered favorable to Carlton, Carlton has failed to demonstrate that the manual was material under *Bagley*.[1] Carlton alleges that two jury notes, both of which asked about Agent Gessner's testimony regarding the instructions he gave to confidential informants, demonstrate the materiality of the manual. These notes, however, only indicate that the jury was concerned with the verbal instructions actually given by Agent Gessner. Because Carlton never saw the manual, having it in evidence would not have helped to answer the jury's questions about the instructions actually given to Carlton. Moreover, Carlton's attorney was allowed to and did cross-examine Agent Gessner and Informant Thakur regarding the instructions given to confidential informants like Carlton. After examining the entire record, we cannot say that there is a reasonable probability that, had Carlton been given access to the manual, the result of the trial would have been different. In short, there is nothing in the manual that tends to

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[1] Contrary to Carlton's assertion, materiality under Brady does not depend on whether the defendant made a request for the evidence or whether the defendant's request was general or specific. The Supreme Court expressly rejected such an approach in *Bagley*. *See* 473 U.S. at 682, 105 S. Ct. at 3383. Instead, the Supreme Court adopted one materiality standard "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence to the accused." *Id.*

undermine confidence in the outcome of the trial. *See Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383.

Accordingly, we conclude that the District Court's decision to deny Carlton's request for the U.S. Customs Policy Manual did not constitute a *Brady* violation. The manual itself was not favorable to the accused. Moreover, even if the manual were somehow considered favorable, Carlton has failed to demonstrate a reasonable probability that with the manual, the outcome of the trial would have been different.

**B. The Government's Closing Argument**

Carlton also argues that the government committed plain error during its closing argument "by shifting the burden of proof to Carlton." Carlton complains of the following comments, made by the government at the end of its closing argument:

> The only issue that I am asking — that I offer you need to consider at this point in time is whether or not, on August the 7th, 1990, this man, Mr. Carlton, was acting as a government informant when he conspired and agreed . . . to distribute cocaine. *If you say to yourself and you believe beyond a reasonable doubt, after everything you've heard, that he was, in fact, acting like a confidential informant or he was a confidential informant acting in that capacity on that day, then he didn't have the intent and that is what the charge says and then he gets to go. And that is the law.* (emphasis added).

After the government concluded its argument and the court excused the jury, Carlton's attorney approached the bench and stated, "the last two comments the prosecutor made to the jury, he had his back to me and was whispering and I couldn't hear it. Something about I offer you something." The government's comments were then read back to Carlton's attorney. No objection followed.

Carlton appears to argue that the government's misstatement of the burden of proof constituted error in two ways. On one hand, he contends that the misstatement *actually shifted* the burden of proof to him in violation of *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970). We disagree with this characterization of the effect of the statement. The government's other correct statements regarding the burden of proof, coupled with the court's jury instructions, which also correctly placed the burden of proof on the government in all respects, are sufficient to mitigate the government's isolated misstatement of the burden of proof. We believe, after carefully reviewing all of the arguments of counsel and the court's instructions, that the burden of proving that Carlton had the requisite criminal intent was correctly placed on the government.

Carlton also appears to argue that the government's misstatement of the law by itself constituted error. We agree with this contention. We have observed that a prosecutor may not misstate the burden of proof. *United States v. Diaz-Carreon*, 915 F.2d 951, 956 n.7 (5th Cir. 1990); *United States v. Cantu*, 876 F.2d 1134, 1138 (5th Cir. 1989). Here, there is no question but that the government misstated the burden of proof and placed it on Carlton. Instead of telling the jury that the government had to prove beyond a reasonable doubt that Carlton *was not* acting as a government informant, the government instructed the jury that Carlton had to prove, beyond a reasonable doubt, that he *was* acting as a government informant during the negotiations. The government further maintained that its statement was "the law." Such a misstatement of the burden of proof by the prosecution is error.

The problem raised by the government's misstatement of the burden of proof, however, is not whether it was error, but whether it was plain error. When a criminal defendant does not object to the portion of the closing argument he challenges on appeal, we review only for plain error. Fed. R. Crim. P. 52(b); *United States v. Simpson*, 901 F.2d 1223, 1227 (5th Cir. 1990); *United States v. Parker*, 877 F.2d 327, 332 (5th Cir.), *cert.*

*denied*, 493 U.S. 871, 110 S. Ct. 199 (1989); *United States v. Livingston*, 816 F.2d 184, 195 (5th Cir. 1987). Plain error is error that is "obvious, substantial, and so basic and prejudicial that the trial lacks the fundamental elements of justice." *Simpson*, 901 F.2d at 1227 (citing *United States v. Davis*, 831 F.2d 63 (5th Cir. 1987)). It exists when the error is "so great that it cannot be cured at trial" or "when any attempt to instruct the jury [on the error] would only serve to focus the jury's attention on the statements." *Davis*, 831 F.2d at 63 (citation omitted). As the Supreme Court has observed: "The plain error exception to the contemporaneous objection rule is to be `used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1047 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14, 102 S. Ct. 1584, 1592 n.14 (1982)).

We are not convinced that the government's misstatement of the burden of proof constituted plain error in this case.[2] In reaching this conclusion, we are guided by two considerations. First, the instructions given to the jury *by the court* correctly placed the burden of proof on the government. The jury was specifically instructed, both orally and in writing, that if they "found from the evidence beyond a reasonable doubt that Mr. Carlton was not acting as a government informant," they could find he had the requisite intent to violate the law. Second, the government's misstatement of the burden of proof was an isolated error in a closing argument in which the government otherwise conceded that it had the burden of proving Carlton's guilt beyond a reasonable doubt. Early in its final argument the

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[2] We do not condone the government's blatant misstatement of the law in this case. Nor are we foreclosing the possibility that under other facts, a similar argument could constitute plain error. *See, e.g., United States v. Vargas*, 583 F.2d 380, 386-87 (7th Cir. 1978); *United States v. Segna*, 555 F.2d 226, 230-32 (9th Cir. 1977). We only hold, that based on the totality of the circumstances, this misstatement did not rise to the level of plain error.

government conceded that the "United States must bring this case and it must prove to you folks beyond a reasonable doubt." Later, the government acknowledged that the only issue was whether the government had "proved its case."

In sum, although we conclude that the government's remarks during closing argument incorrectly indicated that the burden of proof was on Carlton, we hold that the remarks did not constitute plain error. The remarks were not so "prejudicial that the trial lack[ed] the fundamental elements of justice." *Simpson*, 901 F.2d at 1227. This is not, under *Young*, one of those circumstances in which our insistence on compliance with the contemporaneous objection rule will result in a "miscarriage of justice." The balance of the closing argument and the court's instructions correctly set forth the burden of proof.

### C. Agent Gessner's Testimony Regarding Carlton's Independence

Carlton next complains about Agent Gessner's testimony that Carlton was acting "independently" of the agent. During direct examination of Agent Gessner, the government requested that he identify a tape recorded telephone conversation between Carlton and Informant Thakur. A transcript of that tape recorded conversation was introduced as an exhibit at trial. A preliminary notation on the transcript, which was in evidence, revealed that before Informant Thakur called Carlton, Agent Gessner stated that they were placing a call to Carlton and that Carlton had "contacted, independently, without advising the control agent, who is me," about a sale of cocaine.

At trial, the government asked Agent Gessner whether, at the time the preliminary notation was made, he had some suspicion that Carlton was acting independently. Carlton objected to this question on grounds of relevancy. After the District Court overruled the objection, Agent Gessner testified that at the time of the telephone call, his suspicions were confirmed that Carlton was indeed acting independently of him. Carlton then moved for

a mistrial on the ground that Agent Gessner had been allowed to give his opinion on the guilt or innocence of the defendant in front of the jury. His motion was denied.

Carlton does not complain on appeal about the introduction of Agent Gessner's preliminary notation that Carlton was acting independently. Rather, he complains that it was reversible error for the District Court to allow Agent Gessner to testify in open court that he believed Carlton was acting independently. He argues that Agent Gessner's testimony regarding whether Carlton was acting independently violated the prohibition in Federal Rule of Evidence 704(b), which provides:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

We disagree with Carlton's argument for the following reasons.

Agent Gessner was not, within the language of Rule 704(b), an "expert witness testifying with respect to the mental state or condition of a defendant." Instead, he was testifying primarily as a fact witness, and his testimony that Carlton was acting independently fits squarely within Federal Rule of Evidence 701. Agent Gessner was a lay witness who was testifying, in the form of an opinion or inference, to a matter that was rationally based on his perception. See Fed. R. Evid. 701; *United States v. Ruppel*, 666 F.2d 261, 270 (5th Cir.) (finding no error in trial court's admission of testimony about a defendant's state of mind where testimony was based on personal knowledge of law witness), *cert. denied*, 458 U.S. 1107, 102 S. Ct. 3487 (1982). When he testified that Carlton was acting independently, Agent Gessner was basing his inference on the verbal instructions he had given Carlton and Carlton's subsequent behavior that was

inconsistent with those instructions. Moreover, Agent Gessner's testimony was helpful. *See* Fed. R. Evid. 701. Gessner's testimony helped provide a clear understanding of why the telephone conversation between Carlton and Informant Thakur was recorded and aided the jury in its determination of whether Carlton was acting as a confidential informant when he negotiated to sell cocaine to Thakur.

Even if Agent Gessner's testimony that Carlton was acting independently could somehow be characterized as "expert" testimony, it was not, in the words of Rule 704(b), "an opinion or inference as to whether [Carlton] did or did not have the mental state or condition constituting an element of the crime charged." The preliminary notation on the transcript of the tape recorded telephone conversation demonstrates what Carlton meant by the word "independently." The word did not mean "with the requisite criminal intent," but instead that Carlton was acting "without advising the control agent." In short, when Agent Gessner testified that Carlton was acting independently, this testimony only constituted circumstantial evidence of Carlton's intent. It was not an opinion or inference that Carlton had the mental state of the crime charged.

Lastly, even if the District Court's decision to admit Agent Gessner's testimony regarding Carlton's independence was error, the error was harmless. Fed. R. Crim. P. 52(a). As noted above, before Agent Gessner testified that Carlton was acting independently, the transcript of a telephone conversation between Thakur and Carlton, with a notation that Carlton was acting "independently," was admitted as an exhibit. Therefore, Agent Gessner's testimony was cumulative of the evidence contained in the telephone conversation exhibit, the admissibility of which is not contested on appeal. Any error in admitting Gessner's testimony was harmless. *See United States v. Batencort*, 592 F.2d 916, 917 (5th Cir. 1979); *United States v. Knight*, 451 F.2d 275, 280 (5th Cir. 1971), *cert. denied*, 405 U.S. 965, 92 S. Ct. 1171 (1972).

Therefore, we conclude that the District Court did not commit reversible error in admitting Agent Gessner's testimony that Carlton was acting independently. The testimony does not fall within the prohibition of Federal Rule of Evidence 704(b), but instead was admissible under Rule 701. Moreover, even if the testimony was inadmissible, its admission did not affect Carlton's substantial rights within the meaning of Federal Rule of Criminal Procedure 52(a).

### D. Testimony Concerning Money Found in Carlton's Safety Deposit Box

Carlton's final complaint focuses on testimony showing that he had $12,400 in a safety deposit box. He argues that this testimony was one of the many "fruits" of a search and seizure that the District Court found violative of Carlton's Fourth Amendment rights and that therefore it should have been suppressed. We disagree.

Before Carlton was arrested, the government learned, through the aid of Informant Thakur, that Carlton had a quantity of narcotics in his home. Trying to determine the exact location of Carlton's home, a government agent approached the address thought to be Carlton's residence. When the government agent became fearful that he had been detected and the evidence might be destroyed, he entered Carlton's home without a warrant. Government agents immediately conducted a warrantless search of Carlton's home. During that search, they uncovered 10 kilograms of cocaine and seized it. They arrested Carlton shortly thereafter.[3]

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[3] It is unclear from the record whether Carlton was arrested in his home, or, as the government contends, while he "was exiting the duplex." As we will discuss, however, *New York v. Harris*, 110 S. Ct. 1640 (1990), renders the exact location of the arrest irrelevant.

After Carlton was arrested, he made two statements indicating that he had a substantial amount of money in a safety deposit box. The first statement was made shortly after Carlton's arrest, during the arrest inventory. After *Miranda* warnings had been given to Carlton, he informed government agents that he had a safety deposit box at Texas Commerce Bank containing $6000. Carlton's second statement concerning the contents of his safety deposit box occurred at his initial appearance, which was held the day after he was arrested. At that hearing, the magistrate first gave *Miranda* warnings to Carlton. Carlton then indicated that he desired the court to appoint counsel for him. During the course of questioning about his financial ability to retain private counsel, Carlton revealed that he had a safety deposit box containing "[s]omewhere around $10,000." Based on these two statements and other information, the government secured a warrant to search the safety deposit box. Government agents found $12,400 in the box when they executed the search warrant.

Before trial, the District Court found that the pre-arrest search of Carlton's home, and the seizure of cocaine found there, violated Carlton's Fourth Amendment rights. The District Court reasoned that the warrantless entry by government agents was not justified under the "exigent circumstances" exception to the warrant requirement, citing *United States v. Thompson*, 700 F.2d 944, 950 (5th Cir. 1983) and *United States v. Munoz-Guerra*, 788 F.2d 295, 298 (5th Cir. 1986). In its order, the District Court suppressed "all evidence obtained from the warrantless entry and search of Carlton's home, and all fruits thereof."

When the government sought to introduce testimony at trial that Carlton had a large sum of money in his safety deposit box, Carlton objected and moved to suppress the testimony. He claimed that testimony concerning money in his safety deposit

box derived from the pre-arrest search, which the District Court had already ruled unconstitutional. The District Court denied Carlton's motion to suppress without making specific on-the-record findings.[4]

We must first decide whether Carlton has waived his right to complain about the admission of testimony concerning the contents of his safety deposit box. Ordinarily, the failure to move pre-trial for the suppression of allegedly illegal statements acts as a waiver unless the district court grants relief from the waiver. *United States v. Contreras*, 667 F.2d 976, 978 n.2 (5th Cir.) (citing Fed. R. Crim. P. 12(b)(3), 12(f)), *cert. denied*, 459 U.S. 849, 103 S. Ct. 109 (1982). However, when a district court rules on a suppression motion during trial, as in this case, the issue is preserved for appeal. *See id.* (citing *United States v. Hicks*, 524 F.2d 1001, 1003 (5th Cir. 1975), *cert. denied*, 424 U.S. 946, 96 S. Ct. 1417 (1976)). Therefore, the admissibility of testimony regarding the safety deposit box is properly before us.

On appeal, Carlton reasons as follows: The District Court found that the government's pre-arrest search of Carlton's home, and the seizure of cocaine found there, were unconstitutional and had to be suppressed. Because the search and seizure were unlawful, Carlton's arrest shortly thereafter was also unlawful, as "fruit of the poisonous tree." In addition, because Carlton's

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[4] Where a trial court makes on-the-record fact findings in conjunction with ruling on a motion to suppress evidence, those factual determinations are reviewed under the clearly erroneous standard. *See United States v. Montos*, 421 F.2d 215, 219 n.1 (5th Cir.), *cert. denied*, 397 U.S. 1022, 90 S. Ct. 1262 (1970). If, however, a trial court does not make on-the-record findings in connection with a motion to suppress, the trial court's decision will be upheld if any reasonable view of the evidence supports it. Id. Because the District Court did not make any on-the-record fact findings with regard to its admission of the challenged testimony, we review the District Court's decision under the latter standard.

arrest was unlawful, the statements he made subsequent to arrest about the contents of the safety deposit box were also tainted. And finally, because his own statements about the safety deposit box were tainted, the search warrant used to inspect the safety deposit box, as well as testimony from a government agent regarding the contents of the box, were also among the illegal fruits of the government's invalid search of Carlton's home.

Carlton's argument that the testimony concerning the contents of his safety deposit box was inadmissible is premised on two erroneous assumptions. The first is that his arrest was unlawful. The second, which is dependent on the first, is that his post-arrest statements regarding the contents of the safety deposit box were also tainted.

With regard to Carlton's first assumption, the record demonstrates that even before the illegal search of Carlton's home, the government had probable cause to arrest Carlton. Probable cause to arrest exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed. *United States v. Antone*, 753 F.2d 1301, 1304 (5th Cir.), *cert. denied*, 474 U.S. 818, 106 S. Ct. 64 (1985); *United States v. Woolery*, 670 F.2d 513, 515 (5th Cir.), *cert. denied*, 459 U.S. 835, 103 S. Ct. 78 (1982). The probable cause issue must be analyzed under the "totality of the circumstances" as to whether there is a "fair probability" that a crime is occurring. *Antone*, 753 F.2d at 1304 (citing *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983)). Based on the testimony of Agent Gessner and Informant Thakur, we find there was a "fair probability" that Carlton was committing a crime even before the government illegally searched Carlton's home. The government was fully aware of all the negotiations between Informant Thakur and Carlton, and it needed no further evidence that a drug sale was about to be consummated.

Once it is conceded that the government had probable cause to arrest Carlton *before* the illegal search of Carlton's home, we can easily dispose of Carlton's claim. If Carlton was arrested outside the home, as the government contends, the arrest was untainted and any statements made by Carlton after waiving his *Miranda* rights cannot possibly be tainted. Conversely, if Carlton was arrested inside his home, *New York v. Harris*, 110 S. Ct. 1640 (1990), disposes of Carlton's claim.

In *Harris*, the police made a warrantless, in-home arrest of a murder suspect in violation of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371 (1980), which holds that the Fourth Amendment prohibits the police from arresting someone in his or her home without a warrant. After the warrantless, in-home arrest, the police in *Harris* took the suspect to the station house, where they read him his *Miranda* rights. The suspect then waived those rights and signed an incriminating statement.

The issue on appeal in *Harris* was whether the suspect's incriminating statement should have been suppressed solely because the police, by entering the suspect's home without a warrant and without his consent, violated *Payton*. *Harris*, 110 S. Ct. at 1642. Both sides in *Harris* conceded that police had probable cause to arrest the suspect. The Court first observed that "*Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects . . . protection for statements made outside their premises where the police have probable cause to arrest the suspect." *Id.* at 1643. Although the Court reiterated the "familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality," it also emphasized that "attenuation analysis is only appropriate where, as a threshold matter, courts determine that `the challenged evidence is in some sense the product of illegal governmental activity.'" *Id.* at 1643 (citations omitted). Ultimately the Court in *Harris* refused to apply the exclusionary rule to the defendant's incriminating statement and held that "where the police have probable cause to arrest a suspect, the exclusionary rule does not

bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*." *Id.* at 1644-45.

If we assume that Carlton was arrested in his home, a straightforward application of the holding in *Harris* reveals that Carlton's statements about the contents of his safety deposit box were not "fruit of the poisonous tree." The claimed "fruit of the poisonous tree" in this case — Carlton's incriminating statements during the arrest inventory and at his initial appearance — are not legally distinguishable from the incriminating statement made by the suspect in *Harris* at the police station. In both cases, the statements were made after the suspect had been read his *Miranda* warnings and outside of the suspect's home. Because the government had probable cause to arrest Carlton before the illegal search, we conclude under *Harris* that Carlton's subsequent statements about the contents of his safety deposit box, made after he had been given *Miranda* warnings, could not have been suppressed under the "fruits of the poisonous tree" doctrine. Consequently, the evidence challenged by Carlton was not a product of the government's illegal search, but instead the product of the government's lawful custody of the defendant. We hold that the District Court did not err in allowing testimony regarding the contents of Carlton's safety deposit box.

## III. CONCLUSION

Because we conclude that none of Carlton's claims have merit, the judgment of conviction and sentence of the District Court are AFFIRMED.

Filed: Sept. 15, 1992

## APPENDIX B

RULES OF CRIMINAL PROCEDURE

**Rule 52. Harmless Error and Plain Error**

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.